No. 85-1786

In The

Supreme Court of the United States

October Term, 1985

JERSEY SHORE STATE BANK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the Third Circuit Court of Appeals was correct in holding that the Internal Revenue Service does not need to give a third party lender notice pursuant to Section 6303(a) of the Internal Revenue Code of an assessment against an employer for unpaid employee income withholding taxes and Federal Insurance Contribution Act ("FICA") taxes in order for the Internal Revenue Service to obtain judgment against such third party lender for the employer's liability for these taxes under Sections 3505(a) and 3505(b) of the Internal Revenue Code.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully requests that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Third Circuit, entered on January 10, 1986; rehearing denied February 4, 1986, which reversed the decision of the United States District Court for the Middle District of Pennsylvania granting summary judgment in favor of the petitioner.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 781 F. 2d 974 (Appendix, *infra*, 1a-24a). The opinion of the District Court is unreported (27a-37a).

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1986 (1a-24a). A timely petition for rehearing was denied on February 4, 1986 (25a-26a). This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Sections 3505, 6303(a) 6501(a) and 6502(a)(1) of the Internal Revenue Code of 1954 (26 U.S.C.) and 40 U.S.C. Section 270(a)(d) are set out in a statutory appendix (50a-52a).

STATEMENT OF FACTS

1. On December 30, 1983 the United States ("the government") brought this suit in the United States District Court for the Middle District of Pennsylvania against the petitioner, Jersey Shore State Bank[1] ("Jersey Shore" or "the Bank") in order to collect all employee withholding taxes and FICA taxes which Pennmount Industries, Inc. ("Pennmount"), a third party, had failed to pay to the United States together with accrued penalties and interest for the fourth quarter of 1977 through the first quarter of 1980 (32a, 38a-45a). The government sought to impose liability on the Bank as a third party lender pursuant to Section 3505 of

1. Jersey Shore State Bank is a wholly owned subsidiary of Penns Woods Bancorp, Inc.

the Internal Revenue Code.[2] The basis for Count I of the suit by the government was Section 3505(a) of the Code and the basis for Count II of the suit was Section 3505(b) (38a-45a). The Bank filed an answer admitting that it had provided money to Pennmount in the normal course of making commercial loans and raised as a defense, *inter alia*, to both Counts I and II of the complaint the failure of the government to provide the Bank with notice within sixty days of the making of each assessment against Pennmount for non-payment of federal withholding taxes and FICA taxes as required by Section 6303(a) of the Code (46a-49a).

The government moved for summary judgment against the Bank with respect to Count I relating to the liability of the Bank under Section 3505(a). The Bank cross moved for summary judgment on Counts I and II relying on the failure of the United States to give notice to the Bank of the assessments against Pennmount as required by Section 6303(a) of the Code (3a). The government admitted that the Bank had not been given notice with respect to the assessments against Pennmount which the government sought to collect from the Bank and asserted that no such notice was required (3a).

The District Court on March 20, 1985, entered judgment in favor of the Bank on its motion for summary judgment following the rationale of the Seventh Circuit Court of Appeals in *United States v. Associates Commercial Corp.*, 721 F. 2d 1094 (7th Cir. 1983) (33a-38a). The District Court stated: "Furthermore, it is undisputed that the function of the notice and demand requirement in § 6303(a) is to protect the taxpayer. Macatee, Inc. vs. United States, 214 F. 2d 717, 719 (5th Cir. 1954). Yet, the United

2. Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended ("the Code" or "I.R.C.").

States argues that § 6303(a) requires notice only to those parties whose names appear on the assessment list. Such an interpretation runs afoul of the plain language of the statute which specifically requires that notice be given *each person liable for the unpaid tax*, stating the amount due and demanding payment thereof." (34a).

The government filed an appeal from the decision of the District Court in favor of the Bank with the Third Circuit Court of Appeals (2a).

2. The Court of Appeals for the Third Circuit by a 2-1 panel majority reversed the decision of the District Court on January 10, 1986, with a dissenting opinion filed by Judge Weis (1a-24a). The majority opinion of the panel while noting that ". . . section 6303(a) can plausibly be read to support the position of both the government and Jersey Shore . . ." found that Section 6303(a) notice was not required to be sent to a third party lender in order for the United States to proceed with a civil suit against such lender under Section 3505 (10a, 21a). The dissenting opinion of Judge Weis noted: "The issue in this case is not complicated—it is simply whether we read the Internal Revenue Code as Congress wrote it or as the Internal Revenue Service would like us to amend it." (21a).

The Bank filed a timely petition for rehearing which was denied by the Court of Appeals for the Third Circuit on February 4, 1986 (25a).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Third Circuit has decided the tax issue raised in this matter squarely in opposition with the decision of the Eleventh Circuit Court of Appeals in *United States v. Merchants National Bank of Mobile*, 772 F. 2d 1522 (11th Cir. 1985) (per curiam), petition for *cert.* pending to No. 85-1480. The Eleventh Circuit in the latter case rejected the argument of the United States that no notice was required under Section 6303(a) of the Code as a prerequisite to suit against a lender for unpaid federal employment taxes of a third party employer. The Eleventh Circuit followed the decision of the Seventh Circuit Court of Appeals in *United States v. Associates Commercial Corp.*, 721 F. 2d 1094 (7th Cir. 1983) adopting the rationale of the *Associates* court in holding that Section 6303(a) " 'requires that notice of an assessment of unpaid taxes must be provided to 'each person liable for the unpaid tax' within sixty days after the assessment was made, unless otherwise provided by the Internal Revenue Code.' " 772 F. 2d 1522, 1524, citing *Associates*, 721 F. 2d at 1098.

Depending upon the fortuitous circumstance of the Circuit in which suit is brought by the United States for collection of federal employment and FICA taxes against a third party lender pursuant to Section 3505 of the Code will now result in a varying interpretation between the Third, Seventh and Eleventh Circuits Courts of Appeals regarding the obligation of the government for providing notice under Section 6303(a) of the Code to such lender within sixty days of an assessment being made.

Additional appeals involving an interpretation of Section 6303(a) of the Code are now pending in the Third[3], Eighth[4], and Ninth[5] Circuits.

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3. *United States v. American Bank & Trust Co.*, No. 85-1615.

(Cont'd)

2. Section 6303(a) of the Code is clear in its requirement that once the United States has made a tax assessment that notice of that assessment must be given within sixty days "to each person liable for the unpaid tax." (51a). As noted by Judge Weis in his dissent in the present case:

> "The reference to 'each person liable' in § 6303 is not in the least ambiguous. In the case at hand, the government contends that defendant is liable for the tax. Therefore, it seems inescapable that defendant should have been given notice.
>
> The IRS wishes us to redraft that section so that it requires notice only to those individuals against whom taxes have been assessed. The reasons offered for this revision have some logic and would possibly ease administrative burdens on the government, but the arguments are directed to the wrong forum. They should be presented to Congress, not the courts." (22a).

In the present case, the Bank made commercial loans to Pennmount in the normal course of business. More than five years after Pennmount had begun to fail to make payment of federal employment and FICA taxes due to the United States, the government filed the present suit against the Bank for third party derivative tax liability pursuant to Sections 3505(a) and 3505(b) of the Code. At no time did the United States provide notice to

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(Cont'd)

4. *United States v. Messina Builders & Contractors Co.*, No. 85-2505.

5. *United States v. Harvis Construction Co.*, No. 86-1540; *United States v. United California Bank*, No. 85-1873; *United States v. Hunter Engineers & Constructors, Inc.*, No. 84-2652 (argued Nov. 20, 1985).

the Bank of any assessment which it had made for the unpaid taxes against Pennmount as required under Section 6303(a) of the Code (31a).

The government argues that requiring such notice to be given to third party lenders would impose an undue administrative burden on the Internal Revenue Service (19a-22a). The argument of the government, however, ignores the provision of Section 6501(a) of the Code which allows the IRS three years from the time that the employer's tax return has been filed to impose an assessment against the taxpayer (51a). Accordingly the period for the investigation which the government argues is impossible to perform within sixty days is unapplicable, inasmuch as the government has three years to file the assessment against the employer, or alternately, against the third party lender before the running of the sixty day notice period begins. It is during the latter time that adequate investigation could be made by the government with regard to third party lenders whom the government might wish to hold liable under Section 3505 of the Code.[6]

The provisions of Section 3505 of the Code imposing liability on third party lenders constitutes an extraordinary remedy which Congress enacted in favor of the Government to hold third parties liable for unpaid taxes. H. R. Rep. No. 1884, 89th Cong., 2d Sess. at 20; S. Rep. No. 1708, 89th Cong., 2d Sess. at 21-22.

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6. *See* Gombinski, *A Noticeable Restriction: Imposing Section 3505 Liability After Associates*, 62 Taxes - The Tax Magazine 757 (Nov. 1984), where it is noted: "Since Section 6501 would allow the government to make this separate assessment any time within three years from the date that the employer's tax return is deemed to be filed, the government would be afforded reasonable time in which to determine the existence of those lenders who may be liable for the employer's unpaid tax." *Id.* at 770.

It is submitted that if Congress had intended that the provisions of Section 6303(a) relative to the sixty days notice of an assessment were not to apply to persons whom the government seeks to hold liable under Section 3505, then an exception would have been placed in the statute to indicate this fact. Such an exception is not, however, present.

As a policy matter, providing timely notice to a lender of an assessment against an employer would put the lender on notice of tax liability and allow the lender to evaluate its relationship with the borrower. In the present case the first notice of liability that the Bank received was the filing of the lawsuit in District Court, more than five years after the first tax liability against Pennmount arose (32a).

3. The majority opinion of the Third Circuit in the present case failed to take notice of the fact that the filing of the tax assessment confers additional procedural benefits upon the government. Under Section 6501 of the Code, once the IRS has made the assessment within three years from the time that the tax liability arises against the employer, then it has the benefit of an additional six year period of time in order to file suit against a third party lender. (50a). The government, therefore, has the advantage of an additional six years in which to bring suit without any responsibility for giving a third party lender notice of such tax assessment, which would allow the third party lender to evaluate its ongoing relationship with the employer borrower, knowing that the government intends to hold the lender liable for the taxes. As noted by Judge Weis in his dissent in the instant case in the Third Circuit:

> "It bears mentioning that the dispute here is not about a meaningless formality. The assessment of taxes against Pennmount had the effect of enlarging the statute of limitations against

defendant bank for six years. 26 U.S.C. § 6502(a)1. *United States v. Associates Commercial Corp.*, 721 F. 2d 1094, 1097 (7th Cir. 1983). The likelihood of prejudice because of the loss or destruction of records by one secondarily liable is real and substantial. *United States v. Associates Commercial Corp.*, 548 F. Supp. 171, 174 (N.D. Ill. 1982).

The net effect of the Code revision urged by the IRS is to give less procedural protection to one secondarily liable than to the primary obligor. The notice of assessment will alert the taxpayer directly liable to the lengthened statute of limitations. He may then preserve pertinent records, arrange for payment, compromise, or take other steps in his own best interests. Without notice of the assessment, however, the party liable under § 3505 may not be alerted to his continuing exposure and concomitant risks. I am not convinced that Congress intended such an anomalous result." (23a).

4. The majority opinion of the Third Circuit misapprehended the legislative history with regard to the enactment of Section 3505 of the Code. The opinion in interpreting the meaning of Section 3505 of the Code made reference to the Congressional Reports of the Senate and House, quoting the language from those sections of the reports which related not to the enactment of Section 3505 of the Code but to the amendment to Section 1 of the Miller Act, 49 Stat. 793, referencing the requirements for performance bonds on public works (18a-19a). The latter amendment was enacted as part of the Federal Tax Lien Act of 1966, Pub. L. 89-719, which also included enactment of Section 3505 of the Code.

The majority opinion noted: "Although we do not intend to downplay the potential burden resulting from our construction of section 6303(a), we find the legislative history of Section 3505 quite instructive on the question of prejudice to parties like Jersey Shore." (18a).

Section 1 of the Miller Act, *supra,* is contained in 40 U.S.C. Section 270(a)(d). The latter section requires a performance bond to be posted by a contractor for government contracts to insure payment of payroll associated taxes to the government. While the discussion in the House and Senate Reports of Section 3505 of the Code appears in part E1 of the reports, the language cited by the majority opinion in the instant case, is contained in part E2 of both the House and Senate Reports which discusses the amendment to the Miller Act, *supra,* 40 U.S.C. Section 270(a)(d) (18a-19a).

The language of the aforesaid amendment to the Miller Act requiring performance bonds from contractors in order to insure payment of government taxes associated with payrolls, comports with the view expressed in the majority opinion that sureties and lenders are in essence the better risk bearers to include the costs of potential payroll tax liabilities in their premiums or as part of their loan security (18a-19a). Such an interpretation would be consistent with the performance bond requirements of the Miller Act, *supra,* when sureties are acting as obligors on a bond, or lenders are acting as guarantors of payroll taxes on a loan.

The language from the House and Senate Reports as quoted by the majority opinion of the Third Circuit does not comport, however, with its interpretation of the congressional purpose in enacting Section 3505 of the Code (18a-19a). If as the majority opinion notes, liability under Section 3505 of the Code arises only if the lender has actual knowledge that the employer does not intend to or will not pay over the taxes required to be withheld, or alternately, is itself directly paying net wages without payment

of the payroll taxes; the question arises as to why, given such a scienter requirement under 3505, would the Senate and House Reports above quoted by the majority opinion, purportedly as an interpretation of Section 3505 of the Code, indicate that lenders could protect themselves against such losses attributable to withholding taxes "by their including the amounts in their loans and taking adequate security." (18a-19a) citing S. Rep. No. 1708 at 23; H.R. Rep. No. 1884, at 22.

If in fact the language of the legislative history cited in the majority panel opinion in the instant case applies to Section 3505, then the above referenced language in the reports is not logical inasmuch as there would be no need for lenders to include possible tax liabilities in their loans, as liability for such payroll taxes could never result under Section 3505 absent some volitional cognitive act on the part of the lenders with regard to the nonpayment of payroll taxes of a contractor.

Inasmuch as such an interpretation results in a nullity, it is submitted that the language above cited by the majority opinion from the House and Senate Reports actually is a commentary on the amendment to Section 1 of the Miller Act, *supra,* with reference to performance bond requirements to be furnished by contractors. Indeed the sections of both the House and Senate Reports where the commentary cited by the Third Circuit appears would support such a view (18a-19a). In such situations, it is obvious that when a surety provides a performance bond which includes a guarantee of payment of payroll taxes, or alternately, when a lender in effect provides a performance bond by guaranteeing payment of payroll taxes under 40 U.S.C. Section 270(a)(d), that both the surety and the lender are acting as guarantors of the taxes, thereby subjecting themselves to an absolute liability in the event that such taxes are not paid by the contractor. In this context, the surety can provide protection by increasing the premiums on the performance bond, and the lender

can likewise provide protection by increasing its loan fees and taking additional security to cover such potential loss.

Such absolute liability is not the case, however, under Section 3505 of the Code. It is submitted therefore that the legislative history cited by the majority opinion in the instant case does not support its interpretation of Section 3505 of the Code.

5. As noted previously, a petition for certiorari has been filed by the Solicitor General on behalf of the United States and is pending before this Court to Number 85-1480 in the case of *United States v. Merchants National Bank of Mobile, supra,* at 5. Due to the fact that the instant case also involves a consideration of the same tax issues raised with regard to an interpretation of the notice provision of Section 6303(a) of the Code as it relates to liability sought to be imposed on a third party lender under Section 3505 of the Code, it is submitted that the petition for certiorari in the instant case should be granted and joined for argument with *Merchants National Bank of Mobile, supra,* before this Court.

Alternately, assuming that the petition for certiorari in *United States v. Merchants National Bank of Mobile, supra,* is granted, the petitioner would request that the judgment of the Third Circuit Court of Appeals in the instant case be stayed pending a decision by this Court with regard to the tax issues raised as noted above.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April, 1986

APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-5263

UNITED STATES OF AMERICA,
Appellant

v.

JERSEY SHORE STATE BANK
Appellee

Appeal from the United States District Court
for the Middle District of Pennsylvania

Argued: November 5, 1985

Present: SEITZ, WEIS, and ROSENN,
Circuit Judges.

(Opinion Filed: JANUARY 10, 1986)

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Appendix A

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OPINION OF THE COURT

SEITZ, *Circuit Judge*.

The United States appeals from an order of the district court granting summary judgment in favor of the defendant, Jersey Shore State Bank ("Jersey Shore" or "the Bank"). This court has jurisdiction over the appeal by virtue of 28 U.S.C. § 1291 (1982).

I.

The United States brought this action alleging that Jersey Shore was personally liable under I.R.C. § 3505(a) and (b) (1982) for the unpaid federal withholding tax liabilities of Pennmount Industries, Inc. ("Pennmount"). The complaint alleged that from the fourth quarter of 1977 through the first quarter of 1980, Jersey Shore (i) paid wages directly to Pennmount employees and (ii) supplied funds to Pennmount for the specific purpose of paying wages with actual notice and knowledge that Pennmount did not intend to, or would not be able to, make timely payments or deposits of the federal taxes required to be deducted and withheld. The complaint also alleged that the Bank's liability under section 3505(a) totals $76,547.57 plus interest, and that its liability under section 3505(b) totals $72,069.00 plus interest.

Appendix A

In its answer, Jersey Shore admitted making commercial loans to Pennmount, but denied any liability under section 3505. The Bank also alleged that the complaint failed to state a claim upon which relief could be granted, because the United States did not provide it with timely notice of the assessments against Pennmount, which it asserted were required by I.R.C. § 6303(a) (1982).

The United States moved for partial summary judgment with respect to the first count of its complaint, which involved Jersey Shore's liability under section 3505(a). At the same time, the Bank moved for summary judgment on both counts of the government's complaint, arguing that the government's failure to give it notice of the assessments against Pennmount pursuant to section 6303(a) precluded the United States from bringing suit. In its reply, the United States admitted that Jersey Shore had not been given notice pursuant to section 6303(a), but argued that it was not required to give the Bank such notice and, alternatively, that even assuming that such notice was required, the failure to give it did not bar the United States from bringing suit to collect the Bank's liability under section 3505.[1]

Relying upon the Seventh Circuit's opinion in *United States v. Associates Commercial Corp.*, 721 F.2d 1094 (7th Cir. 1983), the district court held that where a lender is liable under section 3505 for another's withholding taxes, the government is required by section 6303(a) to give notice of the assessment against the employer to the lender within sixty days of the assessment. It concluded that the government's failure to give timely notice to Jersey

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1. The United States also argued that Jersey Shore received actual notice of its potential liability for Pennmount's withholding taxes as early as January of 1979.

Shore of the assessments against Pennmount barred the United States from bringing suit. This appeal followed.

II.

Prior to 1966, only "employers" were liable for income, social security, and railroad retirement taxes required to be withheld and deducted from employee wages--despite the many situations in which persons other than employers directly or indirectly paid the wages. Problems arose when these third parties paid the employees only "net" wages, neglecting to pay to the government the withholding taxes due. When this occurred, the government was often unable to collect the taxes required to be deducted and withheld, despite the fact that it was required to credit the employees' accounts for them. Recourse against the employer was often fruitless, because it was frequently without any financial resources. And the government could not proceed against the third parties who paid the net wages, because they were not "employers" under the Code and, therefore, were not liable for the taxes. S. Rep. No. 1708, 89th Cong., 2d Sess. 21-22, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3722, 3742-43 [hereinafter cited as S. Rep. No. 1708]; H.R. Rep. No. 1884, 89th Cong., 2d Sess. 20 (1966) [hereinafter cited as H.R. Rep. No. 1884].

This practice, commonly known as "net payroll financing," was apparently quite prevalent in the construction industry. *See generally United States v. Algernon Blair, Inc.*, 441 F.2d 1379 (5th Cir. 1971). In an attempt to keep work moving along smoothly, prime contractors would provide their financially troubled subcontractors with the funds necessary to meet their payrolls, *see id.* at 1381, or would help them arrange the necessary credit through a third-party lender, *see*

United States v. Coconut Grove Bank, 545 F.2d 502, 505 (5th Cir. 1977). However, anxious to limit their exposure on such transactions, the prime contractor or third-party lender typically provided the subcontractor funds only to the extent of its *net* payroll, thus making the government an unwilling "co-lender" of such loans to the extent of the withholding taxes due.

To stem this loss of revenue, Congress enacted section 3505. *See Coconut Grove Bank*, 545 F.2d at 505; *Algernon Blair, Inc.*, 441 F.2d at 1381. It imposes liability on lenders, sureties, and other third parties in two specific situations. First, section 3505(a) provides, in pertinent part, that:

> if a lender, surety, or other person, who is not an employer with respect to an employee . . . pays wages *directly* to such an employee . . . such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) required to be deducted and withheld [emphasis added].

Similarly, section 3505(b) provides, in pertinent part, that:

> [i]f a lender, surety, or other person supplies funds to . . . an employer for the *specific purpose of paying wages* of the employees of such employer, with *actual notice or knowledge* . . . that such employer does not intend to or will not be able to make timely payment or deposit of the amounts of tax required . . . to be deducted and withheld by such employer . . . such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) which

> are not paid over to the United States by such employer [emphasis added].

In short, Congress thought it fair to impose liability on third parties like Jersey Shore in these two situations, because they sit in essentially the same position vis-a-vis control over payroll funds and access to information as the employer itself. *See* S. Rep. No. 1708, at 22 (observing that given the amount of information available to such third parties and the burden of proof upon the government, there is "no reason for distinguishing between the portion of the total wages which is owed and should be paid to employees . . . and the portion of the wages which is owed and should be paid to the Government"); H.R. Rep. No. 1884, at 20 (*id.*).

With this background, we turn to the issue posed by the present appeal: Whether the government's failure to provide Jersey Shore with notice of the assessments against Pennmount pursuant to I.R.C. § 6303(a) (1982) bars its suit to collect the Bank's liability under I.R.C. § 3505 (1982).

III.

"When interpreting a statute, the starting point is of course the 'language of the statute itself. If the language is clear and unambiguous, and there is no 'clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *National Freight v. Larson*, 760 F.2d 499, 503 (3d Cir.) (citation omitted), *cert. denied*, 106 S. Ct. 228 (1985), *quoting Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

Section 6303(a), the notice provision presently at issue, is found in Subtitle F of the Internal Code, which governs procedure under and administration of the internal revenue laws. It provides, in pertinent part, as follows:

> **§ 6303. Notice and demand for tax**
>
> **(a) General rule**
>
> Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof.

Jersey Shore argues that the phrase "each person liable for the unpaid tax" requires that notice of the assessment be sent not only to the persons against whom the assessment has been made, but to every third party who might be liable for the tax, including those liable under section 3505.

This interpretation of section 6303(a) concededly derives some support from a literal reading of the language of the statute. *See Associates Commercial Corp.*, 721 F.2d at 1098 (holding that "since Associates is a 'person liable for the unpaid tax' for the purposes of Section 6303(a), it is entitled to notice of the assessment of the unpaid tax mandated by that statute") (citation omitted); *accord United States v. Merchants Nat. Bank*, 772 F.2d 1522, 1524 (11th Cir. 1985) (per curiam).[2] However, even "the use of the

2. In addition to the Seventh and Eleventh Circuits, the district courts that have addressed this question are in substantial agreement that failure to provide a third party with notice pursuant to section 6303(a) bars suit under section 3505(a) and (b). *See United States v. Messina Builders and Contractors Co.*, No. 84-0668-CV-W-9 (W.D. Mo. Oct. 11, 1985); *United States v. American Bank & Trust*, No. 84-5624 (E.D. Pa. Aug. 9, 1985); *United States v. Hunter Eng'rs & Constructors*, No. 83-1305 (D. Hawaii Sept. 6, 1984); *United States v. United Cal. Bank*, No. C-80-3422-WAI (N.D. Cal. Feb. 14, 1985). *But see United States v. National Acceptance Co. of America*, 603 F. Supp. 1351, 1353 (E.D. Mich. 1985) (rejecting *Associates Commercial Corp.*, and holding that the government may sue to collect a lender's liability under section 3505 without giving section 6303(a) notice).

words of the statute as the primary guide to its interpretation requires an appreciation of the general purpose of the legislation so that literalism does not frustrate that purpose." *Schiaffo v. Helstoski*, 492 F.2d 413, 428 (3d Cir. 1974). A court must, therefore, look beyond the express language of a statute to give force to Congressional intent in two circumstances: "where the statutory language is ambiguous; and where a literal interpretation would thwart the purpose of the overall statutory scheme or lead to an absurd result." *International Tel. & Tel. Corp. v. General Tel. & Elecs. Corp.*, 518 F.2d 913, 917-18 (9th cir. 1975); *see also Government of the Virgin Islands v. Berry*, 604 F.2d 221, 225 (3d Cir. 1979) ("'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to . . . an absurd consequence. . . . The reason of the law in such cases should prevail over its letter.'") (quoting *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-87 (1868)). And any construction of a particular statute that would render all or part of the statutory scheme a "dead letter" is disfavored and to be avoided. *See Commissioner v. Bilder*, 289 F.2d 291, 298 (3d Cir. 1961), *rev'd on other grounds*, 369 U.S. 499 (1962).

A.

First, unlike the Seventh Circuit, we find the "plain meaning" of the statute less than wholly unambiguous. Section 6303(a) not only requires the government to "give notice to each person liable for the amount of the tax," it also requires notice of a particular kind: i.e., one "*stating the amount and demanding payment thereof.*" In other words, a section 6303(a) notice consists of two discrete elements: (i) notice of the amount that has been assessed and (ii) a *demand* that the individual receiving the notice *presently* satisfy that assessment.

Thus, the plain language of the statute envisions a notice not unlike a typical creditor's dunning letter, providing the individual receiving it with one last opportunity to pay the taxes before the government invokes the full panoply of its administrative collection powers. *See generally* M. Saltzman, *IRS Practice and Procedure* ¶ 14.01 (1981) (comparing tax collection with debt collection under the Uniform Commercial Code); *see also id.* ¶ 14.03 (describing the processing of tax collection cases); McGregor & Davenport, *Collection of Delinquent Federal Taxes*, 28 S. Cal. Tax Inst. 589, 761-82 (1976) (describing the process of collecting delinquent withholding taxes) [hereinafter cited as McGregor & Davenport, *Collection of Delinquent Federal Taxes*].

In sharp contrast to this type of notice is that contemplated by Jersey Shore and required by the Seventh Circuit. After *Associates Commercial Corp.*, the government must provide third parties like Jersey Shore with a copy of the notice of assessment and demand for payment sent to employers like Pennmount within sixty days of the assessment of such taxes. But such a notice serves quite a different purpose than that described above. First, it does not *demand* payment from the third party receiving the notice; nor does it even indicate the likelihood that the government will, at some time prior to the expiration of the applicable statute of limitations, look to that third party for payment. Similarly, such a "notice" will only fortuitously reflect the third party's potential liability, given both the differences between the taxes for which the employer and third party are liable and the limitations on liability contained within section 3505 itself. For example, the third party's liability is limited to those taxes required to be deducted and withheld from the employees' wages; it "is not liable for the employer's portion of payroll taxes." S. Rep. No. 1708,

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at 23; H.R. Rep. No. 1884, at 21. The notice and demand sent to the employer, however, does include these amounts. Thus, it overstates the third party's potential liability. Similarly, under section 3505(b), the third party's liability is limited to twenty-five percent of the money lent, which may or may not equal the amount assessed against the employer. And unless the time period in which the third party paid net wages directly corresponds precisely with that reflected in the assessment, the third party's liability under section 3505(a) will not equal that shown on the notice sent to the employer.

Accordingly, we find that section 6303(a) can plausibly be read to support the position of both the government and Jersey Shore, thus justifying our resort to its legislative history and prior judicial treatment to determine its proper construction. In fact, to the extent we find the "plain meaning" of the statute controlling, we find the government's construction of the statute the more natural and logical reading of the language: i.e., section 6303(a) requires notice only to those individuals against whom the taxes have been assessed. *See Guide to the Internal Revenue Code of 1954*, 1955 U.S. Code Cong. & Ad. News 1183, 1621 ("Subsequent to a valid assessment of any tax liability, . . . the Secretary . . . must, as soon as practicable, and within 60 days, after the making of the assessment serve a notice on the *delinquent taxpayer* stating the amount due and demanding payment thereof.") (emphasis added; footnote omitted); Andrews, *The Use of the Injunction as a Remedy for an Invalid Federal Tax Assessment*, 40 Tax L. Rev. 653, 658 (1985) ("As soon as practicable, and within 60 days after making the assessment, the Service is required to give *the taxpayer* notice of the unpaid amount and demand for its payment . . . .") (emphasis added).

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B.

Under the Internal Revenue Code of 1939, the predecessor statute to section 6303(a) explicitly applied only to the collection efforts of the tax Collector, who by statute was authorized to collect taxes solely by administrative means, such as levying on the taxpayer's property. I.R.C. § 3655 (1952).[3] By contrast, the Commissioner of Internal Revenue was authorized to bring civil suits to collect taxes owed. *Id.* § 3740. And it was long settled that the government's failure to assess its taxes did not preclude it from exercising its common-law right to sue for the taxes. *See, e.g., Macatee, Inc. v. United States*, 214 F.2d 717, 719-20 (5th Cir. 1954).[4] It was equally well settled that where the government had assessed the taxes but failed to provide the taxpayer with notice of that assessment, it could still proceed by suit to collect the taxes owed. *United States v. Erie Forge Co.*, 191 F.2d 627 (3d Cir. 1951), *cert. denied*, 343 U.S. 930 (1952); *Jenkins v. Smith*, 99 F.2d 827 (2d Cir. 1938); *see also Marvel v. United States*, 719 F.2d 1507, 1513-14 (10th Cir. 1983) (alternative holding).

Where the government intends to proceed administratively to collect the taxes due, the need for the notice provided by section 6303(a) and its

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3 Section 3655 provided, in pertinent part, that:

> Where it is not otherwise provided, the collector shall within ten days after receiving any list of taxes from the Commissioner, give notice to each person liable to pay any taxes stated therein, . . . stating the amount of such taxes and demanding payment thereof.

4 The government's right to bring suit in this fashion was based simply on its common law right to sue on a debt, which exists independently of any statute. *See, e.g., Dollar Savings Bank v. United States*, 86 U.S. (19 Wall.) 227, 239-40 (1874); *Damsky v. Zavatt*, 289 F.2d 46, 51 (2d Cir. 1946) (Friendly, J.).

predecessor statutes is readily apparent. The 1939 and 1954 Codes both provide that upon assessment and demand, all of the taxpayer's property, both real and personal, becomes subject to a lien in favor of the United States. I.R.C. §§ 6321, 6322 (1982); I.R.C. §§ 3670, 3671 (1952). If the taxpayer neglects or refuses to pay the taxes within ten days after notice and demand, the government may levy on or distrain any property belonging to the taxpayer on which a tax lien exists. I.R.C. § 6331(a), (b) (1982); I.R.C. §§ 3690, 3692, 3700 (1952). And after levying on or distraining the taxpayer's property, the government may sell it to satisfy the taxes owed. I.R.C. §§ 6331(b), 6335 (1982); I.R.C. §§ 3693, 3695(a)-(b), 3712 (1952). Thus, given the scope of the government's power to collect summarily the taxes owed under this statutory scheme, the notice required by sections 3655 and 6303(a) plays an important role: "[t]he purpose of requiring such a notice and demand is for the protection of the taxpayer." *Macatee, Inc.*, 214 F.2d at 719.

Where, as under section 3505,[5] the government cannot proceed administratively, the need for notice under section 6303(a) is not nearly so self-evident. If the government cannot assess the third party's

5. Unlike its treatment of various other third-party liabilities, Congress did not authorize the Internal Revenue Service to assess separately third parties liable under section 3505, which would have empowered the government to proceed adminstratively. *Cf., e.g.*, I.R.C. § 6671(a) (1982) (providing that liability under section 6672 is to be "assessed and collected in the same manner as taxes"). Rather, Congress apparently intended that liabilities under section 3505 be collected in civil proceedings only:

> In the event a payor does not voluntarily satisfy the liability imposed by section 3505(a), the United States may collect such liability by appropriate civil proceeding.

liability, it cannot employ its summary collection methods against that party. Thus, such a third party is in no danger of having his property immediately seized or attached to satisfy the obligation. In a civil action, then, service of the government's complaint provides the party with all the notice and protection required; thus, the language "each person liable for the unpaid tax," then, refers only to those parties against whom the taxes have been assessed, and against whom the government can proceed administratively.

The Seventh Circuit, however, rejected any interpretation of section 6303(a) that differentiated between the manner in which the government attempts to collect the taxes owed:

> Section 6303(a) itself does not indicate that the right to notice is dependent upon which tax collection option the government uses. Section 6303(a) requires notice of the assessment of unpaid taxes in order to protect the person liable for paying the taxes, and this rationale applies regardless of which collection mechanism is used.

721 F.2d at 1100 (citations omitted). In so doing, it distinguished those cases beginning with *Jenkins v. Smith*, 99 F.2d 827 (2d Cir. 1938) (per curiam), that stood for the proposition that the government's failure to give the notice required by section 6303(a) and its

> In the event a supplier of funds does not voluntarily satisfy the liability imposed by section 3505(b), the United States may collect such liability by appropriate civil proceeding.

H.R. Rep. No. 1884, at 65-66; *see also United States v. First Nat. Bank*, 652 F.2d 882, 889 (9th Cir. 1981) (holding that liability under section 3505 cannot be separately assessed); *United States v. Dixieline Fin.*, 594 F.2d 1311, 1313 (9th Cir. 1979) (*id.*).

predecessor statutes barred only the its right to collect the taxes administratively. It based this conclusion on what it apparently considered to be a critical organizational change in the statutory scheme enacted in 1954:

> *Jenkins* and its progeny do not support the government's position. Section 1545 [a predecessor to sections 3655 and 6303(a)] was part of a statutory scheme quite different from that of which Section 6303(a) is now a part. Under the earlier scheme, the tax Collector had no authority to collect taxes by means of a civil proceeding, whereas under the Internal Revenue Code of which Section 6303 is a part, the Secretary of the Treasury . . . may collect the unpaid tax by levy (§ 6331) or by civil proceeding (§ 7401). . . . By necessary implication, then, where, as here, the same official . . . has power both to collect by levy and to authorize civil collection proceedings. . . . the failure to provide [the] statutorily required notice bars both recovery methods.

Id. As we read the court's opinion, then, the court focussed primarily upon the official in whom the power to collect the taxes had been lodged, rather than on the means by which that official sought to collect them.

After an examination of the administrative and legislative history leading up to the enactment of the Internal Revenue Code of 1954, we find that the Seventh Circuit misconceived the effect of any organizational changes wrought by its enactment. Consideration of the relationship between section 6303(a) of the 1954 Code and its predecessor statutes, combined with an appreciation of the organizational changes effected by President Truman prior to the enactment of the 1954 Code, leads us to conclude that

the critical variable is the manner in which the government seeks to collect the taxes, not the official entrusted with that power. Thus, section 6303(a) requires notice only to those individuals against whom the government can proceed administratively.

First, the Committee Reports accompanying section 6303(a) indicate that Congress intended to make only "two changes from existing law," neither of which affects who is entitled to notice of an assessment. H.R. Rep. No. 1337, 83d Cong., 2d Sess. A405-06, *reprinted in* 1954 U.S. Code Cong. & Ad. News 4017, 4553; S. Rep. No. 1622, 83d Cong. 2d Sess. 574, *reprinted in* 1954 U.S. Code Cong. & Ad. News 4621, 5222-23.[6]

Second, the organizational changes that the court placed so much weight on in *Associates Commercial Corp.* resulted not from Congressional action with respect to the 1954 Code, but from executive action under the 1939 Code. The current organization of the Internal Revenue Service stems from two reorganization plans promulgated by President Truman in 1950 and 1952, which Congress subsequently incorporated by reference when it enacted the 1954 Code. I.R.C. § 7804 (1982); *see also* 4 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 110.1, at 110-2 to -3 (1981); 9 J. Mertens, *The Law of Federal Income Taxation* § 49.02 (rev. ed. 1982). For example, the power to collect taxes both administratively and by means of a civil proceeding was first vested in the Secretary of the Treasury *under*

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6. Specifically, Congress intended that notice and demand be given as soon as practical but no later than sixty days, rather than within ten days after receipt by the Collector of the Commissioner's certified list of assessments; and that, except in the case of a jeopardy assessment, payment was not to be demanded prior to the last date prescribed by law for the payment of the tax.

the Internal Revenue Code of 1939 by Reorg. Plan No. 26 of 1950, 15 Fed. Reg. 4935 (1950), *reprinted in* 5 U.S.C.A. app. at 274-75 (West 1967) [hereinafter cited as Reorg. Plan No. 26]. Similarly, the office of the Collector was abolished not by the enactment of the 1954 Code, but by the Reorg. Plan No. 1 of 1952, 17 Fed. Reg. 2243, *reprinted in* 5 U.S.C.A. app. at 280-81 (West 1967) [hereinafter cited as Reorg. Plan No. 1].

In neither case is there any indication that the President intended any change with respect to who was to receive notice of an assessment under the 1939 Code. Rather, the reorganizations had two primary goals: first, to increase the efficiency of the Department of the Treasury and the Internal Revenue Service; and second, to assure the honest and impartial administration of the internal revenue acts. *See* Message of the President, Reorg. Plan No. 26, 5 U.S.C.A. app. at 275 ("the reorganizations contained [herein are] essential to clarification of the lines of authority and responsibility in the executive branch"); Message of the President, Reorg. Plan No. 1, 5 U.S.C.A. app. at 281 ("A comprehensive reorganization of [the Internal Revenue Service] is necessary both to increase the efficiency of its operations and to provide better machinery for assuring honest and impartial administration of the [tax] laws."). In fact, to the limited extent that the administrative history speaks to this issue, it indicates an intent not to change the law substantively. *See, e.g.*, Bureau of Internal Revenue, Operations Reorganization Order No. 3, 17 Fed. Reg. 8126 (1952) (delegating to each Director of Internal Revenue all functions relating to the assessment and collection of taxes and the accountability therefore of the predecessor office of the office of Collector of Internal Revenue in order to preserve the right to maintain suit for the refund of taxes); *see also* T.D. 5900, 17 Fed. Reg. 4464 (1952).

Under these circumstances, we find that Congress did not intend to change the law with respect to who must receive notice when it enacted section 6303(a). Congress was fully aware of the changes wrought by Reorg. Plan No. 26 and Reorg. Plan No. 1 when it enacted the 1954 Code. It only follows that the Congress would adapt the language of the Code to fit the existing organization of the Department of the Treasury and the Internal Revenue Service. Thus, absent any legislative history to the contrary, we find that section 6303(a), like its predecessor statute under the the 1939 Code, only requires notice to those individuals against whom the government can proceed administratively. As a result, the government's failure to provide Jersey Shore with a copy of the notice of assessment and demand for payment sent to Pennmount does not bar its suit to collect the Bank's liability under section 3505.

C.

Careful consideration of the substantive requirement of section 3505 further buttresses our conclusion that section 6303(a) does not require notice to parties like Jersey Shore. In construing section 6303(a) to require notice to third parties like Jersey Shore, the Seventh Circuit was apparently concerned that unless such notice be given, third parties like Jersey Shore would have no reason to suspect that they may be liable under section 3505, to their ultimate prejudice. *See* 721 F.2d at 1099-1100. A similar concern has been voiced by other courts that have addressed this question. *See, e.g., United States v. American Bank & Trust*, No. 84-5624, slip op. at 4-5 (E.D. Pa. Aug. 9, 1985) (observing that "any potential burden [on the goverment] is outweighed by the possibility of prejudice to the lender not receiving notice"); *United States v. Associates Commercial*

Corp., 548 F. Supp. 171, 174 (N.D. Ill. 1982).

However, in light of the burden of proof placed upon the government by section 3505, we find this concern to be generally unfounded. By definition, section 3505 liability only arises if the the third party (i) has actual knowledge that the employer does not intend to or will not pay over the taxes the taxes required to be withheld, or (ii) is itself directly paying net wages. In either situation, the third party is, of necessity, actually or constructively aware of its *potential* liability for the the taxes required to be deducted and withheld. Viewed in this light, the notice required by *Associates Commercial Corp.* communicates no additional information; thus, it serves no useful purpose. *Cf. United States v. Dixieline Fin.*, 594 F.2d 1311, 1312-13 (9th Cir. 1979) (holding that no independent assessment is required under section 3505(b), because it would serve no useful purpose). Quite to the contrary, construing section 6303(a) as the Seventh Circuit did simply adds an additional formalistic requirement for the imposition of section 3505 liability--a requirement upon which parties liable under section 3505 can rely, thereby thwarting Congress' intent to recover the unpaid withholding taxes from such persons.

Although we do not intend to downplay the potential burden resulting from our construction of section 6303(a), we find the legislative history of section 3505 quite instructive on the question of prejudice to parties like Jersey Shore. When it enacted section 3505, Congress expressly considered the steps that third parties should take to protect themselves:

> [S]ureties can protect themselves against any losses attributable to withholding taxes by including this risk of liability in establishing their premiums, and lenders by their including the amounts in their loans and taking adequate security.

S. Rep. No. 1708, at 23; H.R. Rep. No. 1884, at 22. In other words, Congress envisioned a system in which third parties would take their potential liability under section 3505 into consideration at the time they entered into the transaction exposing them to liability under the statute.

Moreover, by taking steps to protect themselves at the inception of such transactions, rather than at the time the government assesses the taxes against an employer like Pennmount,

> losses now borne by the Government will fall (as it should) on the employers in the form of a larger bonding, or other fee or cost they must pay. Since the withholding taxes are, in true character, a part of the wages, it seems only appropriate that this cost be borne by the employers in the same manner as is true of the net wage costs.

S. Rep. No. 1708, at 23; H.R. Rep. No. 1884, at 22. Thus, our construction of the two statutes furthers Congress' intent with respect to section 3505, without substantially prejudicing the rights of third parties like Jersey Shore.

D.

The government also argues that requiring section 6303(a) notice for third parties subject to section 3505 liability will, in effect, render the latter statute a "dead letter," thereby thwarting Congress' intent to provide an additional source from which to recover unpaid withholding taxes. In *Associates Commercial Corp.*, the Seventh Circuit rejected this argument as "highly speculative and unsupported by any convincing

statistics." 721 F.2d at 1099. We disagree: in light of the manner such taxes are collected, available statistics and common sense both dictate that such a requirement would impose a prohibitory investigative burden on the government.

First, given the number of returns involved, the government cannot be expected to initiate an investigation each time a taxpayer files a return but fails to pay his full tax liability. For example, in 1973 employers filed 2.3 million withholding tax returns with unpaid balances. McGregor & Davenport, *Collection of Delinquent Federal Taxes*, at 768. Similarly, in that same year individual taxpayers filed 3.8 million returns with unpaid liabilities. *Id.* at 601.

Second, even assuming that the resources were available, an immediate full-scale investigation in all cases involving delinquent tax payments would constitute a significant waste of government resources. Under ordinary circumstances, the problem can be dealt with more efficiently by sending the taxpayer a series of notices, as would be done by any other creditor in a similar situation. For example, in 1980 the Internal Revenue Service sent individual taxpayers 7.05 million first notices for balances due, but only 2.3 million TDA's or Taxpayer Delinquent Accounts (which result only after attempts to collect by notice fail) were issued for *all* types of returns, including individual returns. Internal Revenue Service, *Quarterly Statistical Report*, at 20-21 (Dec. 1980); *see also* McGregor & Davenport, *Collection of Delinquent Federal Taxes*, at 602-05 & n.22 (discussing TDA's). Similarly, of the 2.3 million unpaid withholding returns filed in 1973, approximately 0.8 million were paid in response to such notices, and only 1.5 million TDA's were issued. *Id.* at 768-69.

Finally, both Jersey Shore and the district court implicitly recognize this problem by suggesting that

the government should delay assessing the employer-taxpayer for up to three years, thereby permitting it to identify third parties who might be liable for the taxes. This suggestion, however, would seriously jeopardize the government's interest in collecting the taxes from the employer, because such a practice would enable other creditors to obtain prior liens against the employer's property. As a result, this would seriously undermine the fundamental "purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents." *United States v. Security Trust & Savings Bank*, 340 U.S. 47, 51 (1950).

Under these circumstances, we are forced to conclude that liability under section 3505 would be rendered a substantial nullity if, as an absolute prerequisite for collection, the government is forced to give third parties such as Jersey Shore notice of its assessment against the taxpayer within sixty days.

V.

Accordingly, the judgment of the district court will be reversed and the cause remanded to the district court for further proceedings consistent with this opinion.

WEIS, *Circuit Judge*, dissenting.

The issue in this case is not complicated -- it is simply whether we read the Internal Revenue Code as Congress wrote it or as the Internal Revenue Service would like us to amend it. In clear terms, § 6303(a) states that the Secretary of Treasury "shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax."

The reference to "each person liable" in § 6303 is not in the least ambiguous. In the case at hand, the government contends that defendant is liable for the tax. Therefore, it seems inescapable that defendant should have been given notice.

The IRS wishes us to redraft that section so that it requires notice only to those individuals against whom taxes have been assessed. The reasons offered for this revision have some logic and would possibly ease administrative burdens on the government, but the arguments are directed to the wrong forum. They should be presented to Congress, not the courts.

In *Iselin v. United States*, 270 U.S. 245, 251 (1926), the Supreme Court said that courts should not revise a statute so that "what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."

The courts' limited role was reemphasized in *TVA v. Hill*, 437 U.S. 153 (1978). Once "Congress has spoken in the plainest of words" and "the meaning of an enactment is discerned . . . the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto." Courts may not "pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches." *Id.* at 194-95.

In this case, I cannot even say with assurance that the addition to the statute that the IRS proposes was inadvertently omitted. Certainly, the legislative history of § 6303 provides no basis for such a belief. Moreover, the legislative history of § 3505 does not suggest that notice should not be provided lenders who may be secondarily liable. "Congressional silence, no matter how 'clanging' cannot override the words of the

statute." *Sedima v. Imrex Co., Inc.*, 53 U.S.L.W. 5034, 5038 n.13 (June 25, 1985).

It bears mentioning that the dispute here is not about a meaningless formality. The assessment of taxes against Pennmount had the effect of enlarging the statute of limitations against defendant bank for six years. 26 U.S.C. § 6502(a)(1). *United States v. Associates Commercial Corp.*, 721 F. 2d 1094, 1097 (7th Cir. 1983). The likelihood of prejudice because of the loss or destruction of records by one secondarily liable is real and substantial. *United States v. Associates Commercial Corp.*, 548 F. Supp. 171, 174 (N.D. Ill. 1982).

The net effect of the Code revision urged by the IRS is to give less procedural protection to one secondarily liable than to the primary obligor. The notice of assessment will alert the taxpayer directly liable to the lengthened statute of limitations. He may then preserve pertinent records, arrange for payment, compromise, or take other steps in his own best interests. Without notice of the assessment, however, the party liable under § 3505 may not be alerted to his continuing exposure and concomitant risks. I am not convinced that Congress intended such an anomalous result.

Two courts of appeals have already rejected the precise arguments advanced by the government in this case. *See United States v. Merchants Nat. Bank of Mobile*, 772 F.2d 1522 (11th Cir. 1985) and *United States v. Associates Commercial Corp.*, 721 F.2d 1094 (7th Cir. 1983). I find the IRS position no more persuasive than did those courts, and I join their insistence that the government adhere to the clear mandate of the statute.

The Internal Revenue Code has never been noted for facile comprehension, and dogged plodding

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through it uncovers little of cheer to any taxpayer. The challenged clause is an oasis of clarity in that desert of dull, deadly detail, but even here the IRS, would pile a sandy gloss on the language to obscure the obvious. In *Temple University v. United States*, 769 F.2d 126, 139 (3d Cir. 1985), I saw "no need for the court to be unduly solicitous about curing statutory deficiencies to aid the IRS in doubtful cases." That protest applies even more here where the government's case is less meritorious.

I dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B—DENIAL OF PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5263

UNITED STATES OF AMERICA,

Appellant

v.

JERSEY SHORE STATE BANK,

Appellee

(Civil No. 83-1879 - M.D.Pa. - Scranton)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, and ROSENN, *Circuit Judges*.

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

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voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Seitz
Circuit Judge

DATED: February 4, 1986

APPENDIX C—ORDER OF UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 83-1879

Complaint Filed 12/30/83

(Judge Muir)

UNITED STATES OF AMERICA,

Plaintiff

vs.

JERSEY SHORE STATE BANK,

Defendant

ORDER
March 20, 1985

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

The United States of America filed this lawsuit against the Defendant, Jersey Shore State Bank (Bank), seeking payment of Federal Insurance Contribution Act (FICA) taxes which were withheld from the wages of employees of Pennmount, Industries, Inc. (Pennmount) pursuant to 26 U.S.C. §§ 3505(a) and (b) of the Internal Revenue Code of 1954. Presently pending before this Court are the parties' cross-motions for summary judgment. These motions are now ripe for this Court's consideration.

Appendix C

The undisputed facts in this case are as follows. The Bank is an authorized Pennsylvania banking institution with its main office at 115 South Main Street, Jersey Shore, Pennsylvania. Pennmount Industries, Inc. was a corporation located in Lock Haven, Pennsylvania engaged in the manufacture of wooden tables and chairs. In February of 1976, Pennmount opened a checking account at the Bank and the Bank made Pennmount a working capital loan of $20,000. Between February of 1976 and July of 1977, the Bank provided Pennmount with additional loans which totalled $270,000, secured by mortgages on Pennmount property and by specific receivables of Pennmount. Beginning with the fourth quarter of 1977, and continuing through the first quarter of 1980, Pennmount failed to pay over to the United States of America federal income taxes and FICA taxes which it withheld from the wages of its employees. The parties do not dispute the validity of these taxes.

In June of 1977, Pennmount set up a separate checking account at the Bank, No. 154-261, which was only to be used for the deposit of withholding and FICA taxes. In July of 1977, Pennmount paid to the United States by certified check on the Bank part of the proceeds of a loan from the Bank in satisfaction of Pennmount's delinquent withholding and FICA taxes. Because the company was experiencing financial troubles, Pennmount began paying its employees in cash rather than by check during the latter part of 1977 until October 28, 1977. On that date, Pennmount begin paying its employees by means of money orders issued by the Bank. From October 28, 1977 through January of 1979, Pennmount procured from the Bank a money order for each Pennmount employee in the amount of that employee's net wages. Pennmount paid for the money orders by a check to the bank for the total amount of the net payroll. These payroll payments by money order were made from a third bank account,

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No. 166-308, opened on October 26, 1978. In January of 1978, the tax account, No. 154-261, which Pennmount had established for the purpose of depositing withheld FICA taxes became overdrawn and remained overdrawn through September of 1979. Although checks were drawn payable to the Internal Revenue Service on that special account, the Bank did not pay those checks because the account lacked sufficient funds. In January of 1979, Pennmount ceased its manufacturing operations, and in order to preserve its security, the Bank began directly paying the wages of those Pennmount employees whose services were necessary to conserve the assets of the company. The Bank did not at that time pay to the United States any withholding or FICA taxes for which Pennmount had been delinquent since the first calendar quarter of 1979.

While the Bank concedes that it is liable for Pennmount's withholding and FICA taxes beginning in 1979, the parties dispute whether the Bank's involvement in the payment of wages to Pennmount's employees from October 28, 1977 to December 31, 1979 renders it liable under either 26 U.S.C. § 3505(a) or (b) for the withholding and FICA taxes Pennmount was required to pay to the United States. Section 3505(a) makes a third party personally liable in an amount equal to unpaid withholding and FICA taxes where that third party pays wages directly, or through an agent, to a taxpayer's employees. 26 U.S.C. § 3505(a) provides as follows:

> Direct payment by third parties.—For purposes of sections 3102, 3202, 3402, and 3403, if a lender, surety, or other person, who is not an employer under such sections with respect to an employee or group of employees, pays wages directly to such an employee or group of employees, employed by

Appendix C

> one or more employers, or to an agent on behalf of such employee or employees, such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) required to be deducted and withheld from such wages by such employer.

The companion provision to Section 3505(a) is Section 3505(b) which imposes personal liability on third parties who supply funds to an employer for the purpose of paying wages knowing that the employer does not intend to or will be unable to pay withholding taxes to the Government. 26 U.S.C. § 3505(b) provides:

> Personal liability where funds are supplied.—If a lender, surety, or other person supplies funds to or for the account of an employer for the specific purpose of paying wages of the employees of such employer, with actual notice or knowledge (within the meaning of section 6323(i)(1)) that such employer does not intend to or will not be able to make timely payment or deposit of the amounts of tax required by this subtitle to be deducted and withheld by such employer from such wages, such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) which are not paid over to the United States by such employer with respect to such wages. However, the liability of such lender, surety, or other person shall be limited to an amount equal to 25 percent of the amount so supplied to or for the account of such employer for such purpose.

Appendix C

On October 30, 1984, the United States moved for summary judgment on Count 1 of the complaint which states a claim against the Bank under 26 U.S.C. § 3505(a) which in brief relates to wages paid directly to employees by a third person. The United States argues that the undisputed facts show that by issuing money orders in the net amount of Pennmount employee's wages from October 1, 1977 through December 31, 1978, the Bank directly paid the wages of Pennmount employees so as to be liable for Pennmount's withholding and FICA taxes for that period under 26 U.S.C. § 3505(a) in the amount of $15,011.57 plus interest. The Bank filed a brief in opposition to which the United States filed a reply. On October 31, 1984, the Bank filed its cross-motion for summary judgment in which it requested that it be granted summary judgment on both counts of the complaint because the undisputed facts show that the United States never gave the Bank or Pennmount Industries notice of the filing of an assessment against either the Bank or Pennmount Industries and that that failure was in contravention of the statutory notice requirement set forth in 26 U.S.C. § 6303(a). Failure to comply with the notice provisions of 26 U.S.C. § 6303(a), the Bank argues, precludes the United States from maintaining this action against the Bank. We will first address the Defendants' cross-motion for summary judgment because, if it is granted, it will dispose of this lawsuit.

FICA and employment withholding taxes fall within Subtitle C of the Internal Revenue Code governing employment taxes. Congress added to Subtitle C what are now §§ 5303(a) and 5303(b) in order to provide the IRS a remedy against third persons, such as creditors and banks who directly or indirectly pay the net wages of a taxpayers' employees. Subtitle C does not set out a special procedure which the IRS must follow in order to affix tax liability pursuant to §§ 5303(a) and 5303(b) but instead relies on Subtitle F of the Internal Revenue Code which generally governs procedure

and administration of tax-related prosecutions. Within Chapter 64 of Subtitle F, 26 U.S.C. § 6303 sets forth the procedure by which notice and demand for a tax shall be made. That section provides as follows:

> (a) General Rule.—Where it is not otherwise provided by this title, tne Secretary or his delegate shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling of usual place of business of such person, or shall be sent by mail to such person's last known address.

Jersey Shore argues that because more than five (5) years elapsed between the initial date of notice of the filing of the tax lien assessment against Pennmount and the institution of the present action against the Bank, section 6303(a) has been violated. When Pennmount failed to pay employee withholding and FICA taxes from the beginning of 1977 through the first quarter of 1980, the Government made tax lien assessments against Pennmount. The Government gave Pennmount notice of the filing of its first tax lien against Pennmount on June 22, 1978. The Government admits that it did not provide the Bank with any notice of filing of this tax lien or any other subsequent tax lien assessments against Pennmount until the Government filed this lawsuit against the Bank on December 30, 1983. What this Court must determine is whether the Government's failure to give the Bank prior notice of its potential liability for the assessment made against Pennmount violates § 6303(a) and, if so, what are the consequences of that violation.

Relying on the recent case of United States vs. Associates Commercial Corporation, 721 F.2d 1094 (7th Cir. 1983), the Bank argues that a lender cannot be held liable under 26 U.S.C. § 3505(b) where the Government fails to provide the lender with notice of a filing of a tax lien assessment against the company to which the lender has made loans or extended credit. The *Associates Commercial* Court held that § 6303(a) mandates notice to a lender subject to § 3503(b) liability, and that failure to provide notice pursuant to § 6303(a) bars a subsequently filed civil action. *Id.* at 1098. The Court pointed out that because no specific enforcement procedure applied to proceedings under § 3505(b), those sections of the Internal Revenue Code which created liability such as § 3505(b) had to be read and interpreted in conjunction with those Code Sections setting forth the procedure for enforcement of such liabilities, including the notice requirement of § 6303(a). We agree with the conclusion of the Seventh Circuit Court of Appeals that § 6303(a) is the general notice provision for all liability created under the Internal Revenue Code, including § 3505(b).

The United States of America, in its memorandum in opposition to Jersey Shore's motion for summary judgment, argues that the notice provision of § 6303(a) is only a part of the administrative collection process and not a prerequisite to the collection of taxes by means of civil lawsuit. However, the United States acknowledges that an assessment is "simply a bookkeeping notation . . . made when the Secretary [of the Treasury] or his delegate establishes an account against the taxpayer on the tax rolls." Laing vs. United States, 423 U.S. 161, 170 n. 13 (1976). *See* 26 U.S.C. § 6203. Once an assessment is made, an automatic lien arises against the taxpayers' property by statute. 26 U.S.C. §§ 6321 and 6322. Once an assessment has been made, the IRS has the power to collect that tax using certain summary methods

of collection which do not necessitate court action. *See*, United States vs. Rodges, 51 U.S.L.W. 4621, 4623 (May 31, 1983). But before the IRS can levy on property on which an assessment has been made, the United States admits that the taxpayer must first be notified. *See* Memorandum in Opposition to Defendants' Motion for Summary Judgment, page 12. 26 U.S.C. § 6331(a) and (b). Furthermore, it is undisputed that the function of the notice and demand requirement in § 6303(a) is to protect the taxpayer. Macatee, Inc. vs. United States, 214 F.2d 717, 719 (5th Cir. 1954). Yet, the United States argues that § 6303(a) requires notice only to those parties whose names appear on the assessment list. Such an interpretation runs afoul of the plain language of the statute which specifically requires that notice be given *each person liable for the unpaid tax*, stating the amount due and demanding payment thereof. While the United States properly contends that § 6303(a) does not mandate perfect technical compliance so that belated or constructive notice of the assessment may suffice to render a third party liable, in the case before us absolutely no notice of the assessment was received by the Bank for almost six years until this civil suit was filed in 1983. No claim for constructive notice is made.

The Government also argues that failure to p ovide notice to the Bank under 26 U.S.C. § 6303(a) does not preclude this litigation because it is simply not practical to require the IRS to notify the person potentially liable for a tax within 60 days of assessment. Reading such a requirement into section 6303(a), the Government argues, will impose an impossible requirement on the IRS which will impose a great economic and investigatory burden, requiring the IRS to identify potentially liable third parties. The IRS takes the position that requiring the IRS to notify potentially liable third parties will undermine the purpose of § 3503(b) under which Congress intended to create an additional

source for the recovery of unpaid withholding taxes. But as pointed out by the Bank, 26 U.S.C. § 6501(a) provides that the Government has three years from the time that a tax return is filed to impose an assessment. Therefore, the Government has three years to identify lenders who are potentially liable for an employer's withholding and FICA taxes and to file an appropriate assessment before the 60 day notice period begins to run. Hence, we are not persuaded that requiring the IRS to comply with 26 U.S.C. § 6303(a) will unduly impede its ability to collect withholding and FICA taxes as Congress intended under § 3505(b). We also note that the notice provision of § 6303(a) is only one of the many limitations which Congress has placed on § 3505(b). Because section 3505(b) in effect imposes derivative liability on a lender for an employer's withholding and FICA taxes, it is all the more necessary to insure that lenders receive adequate, prompt notice of a potential claim against them by the Government. United States vs. Associates Commercial Corp., 721 F.2d 1094, 1099 (7th Cir. 1983). We therefore conclude that instead of defeating Congress's intent, as the Government argues, applying the notice provisions of § 6303(a) to lenders subject to section 3505(b) liability gives effect to that intent. If Congress had intended that the notice provisions of 26 U.S.C. § 6303(a) not apply to persons whom the Government seeks to hold liable under 26 U.S.C. § 3505(b) then Congress would have created such an exception in the statute.

Lastly, the Government argues that even if section 6303(a) required the United States to give notice to the Bank of the assessment made against Pennmount, failure to give such notice does not impair the United States's right to sue the Bank under § 3505(b) for Pennmount's employee withholding and FICA taxes. But as noted by the Seventh Circuit Court of Appeals in *Associates Commercial*, section 6303(a) itself does not indicate that the right

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to notice is dependent on which tax collection option the Government uses. 721 F.2d 1094, 1100. Section 6303(a) requires notice of the assessment of unpaid taxes in order to protect the person liable for paying taxes from surprise without regard to the collection mechanism that the government employs. *Id.* Nor are we persuaded by the Government's argument that it has an independent common law right to collect a debt for tax liability independent of the assessment process for which no notice pursuant to § 6303(a) is required.

For the foregoing reasons, we will grant the motion of the Defendant Jersey Shore State Bank for summary judgment.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The motion of the United States for summary judgment is hereby denied.

2. The motion of the Defendant Jersey Shore State Bank for summary judgment is hereby granted.

3. The Clerk of this Court shall enter judgment in favor of the Defendant Jersey Shore State Bank.

4. The Clerk of this Court shall close this file.

s/ Muir
MUIR, U.S. District Judge

Appendix C

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 83-1879

Complaint Filed 12/30/83
(Judge Muir)

UNITED STATES OF AMERICA,
Plaintiff

vs

JERSEY SHORE STATE BANK,
Defendant

JUDGMENT

The issues having been duly reviewed by the Honorable Malcolm Muir, United States District Judge, and a decision having been rendered this date thereon.

It is Ordered and Adjudged that judgment be and hereby is entered in favor of the Defendant Jersey Shore State Bank

Dated at Williamsport, Pennsylvania, this 20th day of March, 1985.

s/ Donald R. Berry
Donald R. Berry, Clerk of Court

By
s/ Barbara Plesce
Deputy Clerk

APPENDIX D—COMPLAINT WITH ATTACHMENTS

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 83-1879

UNITED STATES OF AMERICA,

Plaintiff

v.

JERSEY SHORE STATE BANK,

Defendant

COMPLAINT

The plaintiff, the United States of America, by its undersigned attorney the United States Attorney for the Middle District of Pennsylvania, for its cause of action complains and alleges as follows:

COUNT I

1. This action is begun under 26 U.S.C., Section 7401 at the direction of the Attorney General of the United States, with the authorization and sanction of the Chief Counsel of the Internal Revenue Service, a delegate of the Secretary of the Treasury.

2. This Court has jurisdiction over this action under 28 U.S.C. Sections 1340 and 1345, and 26 U.S.C., Section 7402.

3. The defendant, the Jersey Shore State Bank ('defendant')

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is a bank with offices at 115 South Main Street, Jersey Shore Pennsylvania 17745, within the jurisdiction of this Court.

4. The defendant is a bank which provided money to Pennmount Industries, Inc., (hereinafter referred to as Pennmount), a corporation engaged in the manufacture of wooden tables and chairs.

5. During the fourth quarter of 1977 through the first quarter of 1980, Pennmount failed to pay over to the United States of America federal income, and Federal Insurance Contribution Act ("FICA") taxes required to be withheld from the wages of Pennmount employees.

6. A delegate of the Secretary of the Treasury made assessments against Pennmount according to law for federal income taxes and FICA taxes required to be withheld and deducted from the wages of Pennmount employees for the quarters described in paragraph 5 of Count I as well as quarters not at issue in this lawsuit. Attachment A gives further information concerning these assessments. Despite notice of and demand for payment of these assessments there remains unpaid the sum of $115,986.68 plus accruals owed by Pennmount.

7. Defendant paid wages directly to Pennmount employees during the fourth quarter of 1977 through the first quarter of 1980. Defendant did not deduct or withhold federal income taxes from these wages it paid directly to Pennmount's employees. Defendant did not deduct FICA taxes from these wages it paid directly to Pennmount's employees. Under 26 U.S.C., Section 3505(a) defendant is thus liable to the United States for taxes (plus interest) required to be deducted and withheld.

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8. Defendant had the ability, right, and legal authority to control the funds out of which it made payments of wages directly to Pennmount employees.

9. Under 26 U.S.C., Section 3505(a), defendant is liable to the United States of America for taxes and interest to June 30, 1981 in the amount of $76,547.57 plus accrued interest until paid (or for such greater amount as determined by this Court).

WHEREFORE, the United States of America demands the following:

A. That this court grant a judgment against defendant under 26 U.S.C., Section 3505(a), in an amount equal to the taxes (plus interest) required to be deducted and withheld from the wages of Pennmounts' employees for the fourth quarter of 1977 through the first quarter of 1980.

B. That it be granted any other relief, including costs, that this Court may deem improper.

COUNT II

10. The plaintiff, United States of America reasserts the allegations described in paragraphs 1-6 of Count I of its complaint.

11. During the fourth quarter of 1977 through the first quarter of 1980, the defendant supplied funds to or for the account of Pennmount Industries, Inc., for the specific purpose of paying the wages of employees of Pennmount Industries, Inc.

12. Such funds were supplied with actual notice and knowledge that Pennmount Industries, Inc., did not intend to

Appendix D

or would not be able to make timely payments or desposits of the amount of federal taxes required to be deducted and withheld by Pennmount Industries, Inc., from such wages.

IX

13. The defendant is obligated to the United States by virtue of the provisions of Section 3505(b) (26 U.S.C.) in the amount of $72,069.00 representing twenty-five percent (25%) of the $288,279.85 which was the amount supplied by it to Pennmount Industries, Inc., for the payment of wages during the period described in paragraph 11 of Count II.

WHEREFORE, the United States of America, demands the following:

(a) That this Court determine that the defendant, Jersey Shore State Bank, is indebted to the United States of America in the amount of $72,069.00 plus interest as provided by law.

(b) That this Court grant judgment against the defendant in favor of the United States in the amount of $72,069.00 plus interest as provided by law.

(c) That this court grant any other relief, including costs, that this court may deem proper.

DAVID DART QUEEN
United States Attorney

By: /s/ James W. Walker
Assistant United States Attorney

OF COUNSEL:

MARK G. GELLAR
Trial Attorney, Tax Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 724-6390

TAX PAYER: PENNMOUNT INDUSTRIES, INC.
LOCK HAVEN, PA 17745
EIN: 23-1944909

ATTACHMENT A

Page 1

A S S E S S M E N T

TAX PERIOD	TYPE OF TAX FORM NUMBER OF RETURNS	DATE	TAX	PENALTY	INTEREST	DATE OF NOTICE AND DEMAND	ACCRUED INTEREST TO 11-17-80	ACCRUED FAILURE TO PAY TO 11-17-80	BALANCE DUE 11-17-80	DATE NOTICE OF LIEN FILED
7612	941 WT/FICA	04-04-77	$17,593.05	$ 879.65 (2) 87.97 (3) 175.93 (4)	$ 94.47	04-04-77	$ 791.52	$ 438.76	$ 2,447.28	07/25/77 (6)
7703	941 WT/FICA	06-17-77	11,742.84	1,056.86 (1) 587.14 (2)	102.75	06-17-77	507.65	176.14	2,430.54	07/25/77 (6)
7706	941 WT/FICA	07-18-77	6,691.62	304.12 (1) 50.47 (3)	43.80	07-18-77	589.56	-0-	3,046.47	12/05/77 (6)
		07-18-77	5,061.33	37.58 (3)	24.08	07-18-77				
		08-22-77	5,482.78	19.55 (3)	14.03	08-22-77				
7712	941 WT/FICA	01-02-78	6,607.18			01-02-78	1,439.21	1,090.16	9,210.64	06/22/78 (6)
		01-23-78	6,635.01			01-23-78				
		02-13-78	6,795.43			02-13-78				
		05-08-78		66.07 (4)		05-08-78				
7803	941 WT/FICA	03-27-78	6,595.72			03-27-78	3,506.45	2,599.47	23,590.33	07/27/79 (6)
		05-08-78	4,904.18			05-08-78				
		05-29-78	5,803.49			05-29-78				
		08-14-78		49.04 (4)		08-14-78				
		10-16-78		58.03 (4)		10-16-78				
		12-11-78		65.95 (4)		12-11-78				
7806	941 WT/FICA	07-10-78	6,803.69			07-10-78	2,661.48	1,888.32	19,547.40	12/20/78 (6)
		07-24-78		68.03 (4)		07-24-78				
		08-14-78	5,123.65	230.65 (1) 25.62 (3)	19.16	08-14-78				
		09-18-78	2,588.20	12.94 (3)	10.21	09-18-78				
		10-09-78		28.32 (4)		10-09-78				
		10-16-78		25.88 (4)		10-16-78				
		10-30-78		51.25 (4)		10-30-78				

TAX PAYER: PENNMOUNT INDUSTRIES, INC.
LOCK HAVEN, PA 17745
EIN: 23-1944909

ASSESSMENT

TAX PERIOD	TYPE OF TAX FORM NUMBER OF RETURNS	DATE	TAX	PENALTY	INTEREST	DATE OF NOTICE AND DEMAND	ACCRUED INTEREST TO 11-17-80	ACCRUED FAILURE TO PAY TO 11-17-80	BALANCE DUE 11-17-80	DATE NOTICE OF LIEN FILED
7809	941 WT/FICA	09-18-78	$2,832.54			09-18-78	$2,117.42	$1,506.82	$16,021.28	03/26/79 (6)
		10-16-78	3,465.79			10-16-78				
		11-13-78		$34.65 (4)		11-13-78				
		11-20-78	5,996.10			11-20-78				
		12-18-78		59.96 (4)		12-18-78				
7812	941 WT/FICA	01-08-79	3,926.66			01-08-79	2,127.12	1,419.17	17,269.34	10/26/79 (6)
		01-29-79	4,394.64			01-29-79				
		02-19-79	5,257.78			02-19-79				
		03-12-79		39.26 (4)		03-12-79				
		03-19-79		52.57 (4)		03-19-79				
		10-01-79		43.94 (4)		10-01-79				
7903	941 WT/FICA	03-26-79	2,844.52		$ .14	03-26-79	766.59	506.10	6,715.87	10/26/79 (6)
		05-07-79	1,179.88			05-07-79				
		05-28-79	1,365.06			05-28-79				
		04-16-79		28.23 (4)		04-16-79				
		05-14-79		11.79 (4)		05-14-79				
		07-30-79		13.65 (4)		07-30-79				
7906	941 WT/FICA	06-18-79	929.12		5.10	06-18-79	347.07	209.52	3,323.88	11/26/79 (6)
		07-30-79	918.54			07-30-79				
		08-13-79	883.99	9.29 (4)	4.07	08-13-79				
		09-10-79		9.18 (4)		09-10-79				

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TAX PAYER: PENNMOUNT INDUSTRIES, INC.
LOCK HAVEN, PA 17745
EIN: 23-1944909

ASSESSMENT

TAX PERIOD	TYPE OF TAX FORM NUMBER OF RETURNS	DATE	TAX	PENALTY	INTEREST	DATE OF NOTICE AND DEMAND	ACCRUED INTEREST TO 11-17-80	ACCRUED FAILURE TO PAY TO 11-17-80	BALANCE DUE 11-17-80	DATE NOTICE OF LIEN FILED
7909	941 WT/FICA	09-24-79	$ 865.27		$5.60	09-24-79	$ 341.53	$ 189.00	$ 3,633.87	02/26/80 (6)
		10-22-79	1,331.65		7.75	10-22-79				
		11-12-79	881.02		4.05	11-12-79				
7912	941 WT/FICA	10-24-79	896.96		5.80	10-24-79	241.42	117.85	2,896.80	10/02/80 (6)
		01-28-80	825.56		5.61	01-28-80				
		02-18-80	796.61		6.99	02-18-80				
8003	941 WT/FICA	03-31-80	840.32	$37.81 (1) 8.40 (3)	12.82	03-31-80	229.23	116.54	3,859.56	10/02/80 (6)
		04-21-80	1,545.61	69.55 (1) 15.46 (3)	18.50	04-21-80				
		05-26-80	943.86		13.46	05-26-80				
8006	941 WT/FICA	06-23-80	907.50	40.84 (1) 9.08 (3)	11.46	06-23-80	67.60	36.38	1,993.42	11/06/80 (6)
		07-14-80	911.88		8.68	07-14-80				
									$115,986.68	

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(1) Delinquency Penalty Section 6651(a)(1), Internal Revenue Code of 1954
(2) Depositary Receipt Penalty Section 6656, Internal Revenue Code of 1954
(3) Failure to Pay Penalty, Section 6651(a)(2), Internal Revenue Code of 1954
(4) Bad Check Penalty Section 6657, Internal Revenue Code of 1954
(5) Accrued Failure to Pay Penalty - 1/2 of 1% per month through November 1980
(6) Prothonotary of Clinton County, Lock Haven, PA
(7) On or after November 17, 1980, interest accrual is $32.82 per day.

APPENDIX E—ANSWER

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 83-1879

Complaint Filed 12/30/83

(Judge Muir)

UNITED STATES OF AMERICA,

Plaintiff

vs.

JERSEY SHORE STATE BANK,

Defendant

ANSWER

The defendant, Jersey Shore State Bank, by its counsel Martin A. Flayhart, Esquire, appears and answers the Complaint of the plaintiff as follows:

COUNT I

FIRST DEFENSE

Defendant admits the allegations contained in paragraphs 1, 2 and 3 of the Complaint; admits the allegation contained in paragraph 4 of the Complaint to the extent that money provided by the defendant to Pennmount Industries, Inc. was provided

as a commercial loan; alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 5 and 6 of the Complaint; and denies each and every other allegation contained in Count I of the Complaint.

SECOND DEFENSE

The Complaint fails to state a claim against the defendant upon which relief can be granted. The plaintiff failed to provide the defendant with notice within sixty (60) days of the making of any assessment against Pennmount Industries, Inc. for nonpayment of federal withholding taxes and FICA taxes as required by 26 USC Section 6303.

THIRD DEFENSE

The plaintiff has waived its rights against the defendant by failing to diligently prosecute its claim against Pennmount Industries, Inc., the officers and directors of Pennmount Industries, Inc. and the defendant during the pendency of the bankruptcy action of Pennmount Industries, Inc. in the United States Bankruptcy Court for the Middle District of Pennsylvania to Case No. BK-79-678.

WHEREFORE, the defendant demands that the relief requested by the plaintiff in Count I of its Complaint be denied.

COUNT II

FIRST DEFENSE

The defendant reasserts its answers to the allegations of the

Appendix E

plaintiff contained in paragraphs 1-6 of Count I of the Complaint; and denies each and every other allegation contained in Count .I of the Complaint.

SECOND DEFENSE

The Complaint fails to state a claim against the defendant upon which relief can be granted. The plaintiff failed to provide the plaintiff with notice within sixty (60) days of the making of any assessment against Pennmount Industries, Inc. for nonpayment of federal withholding taxes and FICA taxes as required by 26 USC Section 6303.

THIRD DEFENSE

The plaintiff has waived its rights against the defendant by failing to diligently prosecute its claim against Pennmount Industries, Inc., the officers and directors of Pennmount Industries, Inc. and the defendant during the pendency of the bankruptcy action of Pennmount Industries, Inc. in the United States Bankruptcy Court for the Middle District of Pennsylvania to Case No. BK-79-678.

FOURTH DEFENSE

In the event that the defendant is found obligated to the plaintiff by virtue of the provisions of 26 USC Section 3505 (b) such liability would be computed by adding the total sum of the amount supplied by the defendant to Pennmount Industries, Inc. for the payment of wages plus interest and taking twenty-five (25%) percent of that figure as the statutory amount due the plaintiff.

Appendix E

WHEREFORE, the defendant demands that the relief requested by the plaintiff in Count II of its Complaint be denied.

By: s/ Martin A. Flayhart

Martin A. Flayhart
Attorney for Defendant
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Jersey Shore, PA 17740
(717) 398-4510

Of Counsel:

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APPENDIX F — RELEVANT STATUTES

26 U.S.C. Section 3505(a): Direct payment by third parties. For purposes of sections 3102, 3202, 3402, and 3403, if a lender, surety, or other person, who is not an employer under such sections with respect to an employee or group of employees, pays wages directly to such an employee or group of employees, employed by one or more employers, or to an agent on behalf of such employee or employees, such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) required to be deducted and withheld from such wages by such employer.

26 U.S.C. Section 3505(b): Personal liability where funds are supplied. If a lender, surety, or other person supplies funds to or for the account of an employer for the specific purpose of paying wages of the employees of such employer, with actual notice or knowledge (within the meaning of section 6323(i)(1)) that such employer does not intend to or will not be able to make timely payment or deposit of the amounts of tax required by this subtitle to be deducted and withheld by such employer from such wages, such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) which are not paid over to the United States by such employer with respect to such wages. However, the liability of such lender, surety, or other person shall be limited to an amount equal to 25 percent of the amount so supplied to or for the account of such employer for such purpose.

Appendix F

26 U.S.C. Section 6303(a): General rule. Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

26 U.S.C. Section 6501(a): General rule. Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

26 U.S.C. Section 6502(a): Length of period. Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 6 years after the assessment of the tax

Appendix F

40 U.S.C. Section 270(a)(d): Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under the Internal Revenue Code of 1954 [26 USC § 1 et seq.]. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.